Nos. 87-253, 87-431, 87-462, and 87-775

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, *Appellant*,
v.
CHAN KENDRICK, et. al., *Appellees*.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, *Appellant*,
v.
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CHAN KENDRICK, et. al., *Cross-Appellants*,
v.
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UNITED FAMILIES OF AMERICA, *Appellant*,
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On Appeal From The United States District Court For The District Of Columbia

BRIEF OF COUNCIL ON RELIGIOUS FREEDOM AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES AND CROSS-APPELLANTS

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STATEMENT OF INTEREST

The Council on Religious Freedom is a nonprofit corporation which was formed to uphold and promote the principles of religious liberty. Its Board of Directors is composed of individuals who are active in religious affairs, some in an official capacity, and some on a lay basis; but all

recognize the importance of preserving the principles embodied in the Religion Clauses of the First Amendment. Members of the organization reside throughout the United States and share these concerns.

The issues raised in this case are of particular concern because of the far-reaching implications that may flow if this Court were to sustain the constitutionality of including religious organizations as recipients of tax-derived grants for activities which contemplate counseling with adolescents on matters of moral and religious concerns. The Council also believes that any retreat by this Court from its holding in *Flast* v. *Cohen*, 392 U.S. 83 (1968), would seriously threaten the Establishment Clause guarantees.

SUMMARY OF ARGUMENT

The Adolescent Family Life Act ("AFLA"), on its face, calls for the involvement of religious organizations in carrying out the statute's mandates. As such, without inquiring into the specific religiosity of each institution, the Court should recognize the inherently religious nature of such institutions, and their concomitant potential to use government aid impermissibly to foster their particular religious beliefs and practices. If the sponsored activity is one in which the religious institution would be likely to inculcate religion, then the statute, on its face, violates the Establishment Clause.

Amicus has argued, and the evidence from the grantees has demonstrated, that religious institutions, when carrying out the activity sponsored by the AFLA, are likely to inculcate their religious beliefs. The activity—counseling—is a one-on-one relationship during which the counselor has ample opportunity to transmit religious beliefs. The subject matter—abortion and premarital sex

—is one about which religions hold fundamental beliefs. The authority over the activity is held by religious institutions, whose influence is likely to be felt by both the counselors and the clients. Such an impermissible potential to inculcate a grantee's religious beliefs, in and of itself, violates the Establishment Clause.

Appellant Federal Government contends in its brief that the taxpayer-appellees do not have standing to litigate any claim against the application of the statute. *Amicus* contends that *Flast* v. *Cohen*, 392 U.S. 83 (1968), clearly establishes that appellees not only have standing to facially attack the statute, but also have standing to seek to overturn the application of the statute.

ARGUMENT

I. AFLA, ON ITS FACE, PROVIDES FOR DIRECT INVOLVEMENT OF RELIGIOUS ORGANIZATIONS; SUCH A PROVISION IS INHERENTLY LIKELY, UNDER ESTABLISHMENT CLAUSE PRINCIPLES, TO FOSTER RELIGION.

The Adolescent Family Life Act requires its grantee applicants to describe how they "will, as appropriate in the provision of services . . . *involve* . . . *religious* and *charitable organizations* . . .." 42 U.S.C. § 300z-5(a)(21) (1982) (emphasis added), in carrying out their care and/or prevention services. 42 U.S.C. §§ 300z-2, 300z-5(a) (1982). *Webster's New World Dictionary* defines the term "religious" as: "1. Characterized by adherence to religion or a religion; devout; pious; Godly. 2. Of, concerned with, appropriate to, or teaching religion . . .." *Webster's New World Dictionary* (2d Ed. 1986). *American Jurisprudence*, under "religious society," defines a "religious or church society" as

> A voluntary *organization* whose members are associated together not only for religious exercises, but also for the purpose of maintaining and supporting its ministry, providing the convenience of a church home, and promoting the growth and efficiency of the work of the general church of which it forms a coordinate part.

66 *American Jurisprudence* § 1 (2d Ed. 1973) (footnotes omitted) (emphasis added).

A. No Case-By-Case Judicial Inquiry Is Necessary to Determine That Religious Organizations Are Religious.

The fact that religious organizations are religious should be self-evident. Courts should not have to involve themselves in answering the question of whether religious organizations are religious. Such a position represents both a constitutionally prudent and a common sense approach that recognizes that any organization which defines itself as religious has an extreme likelihood of being religious. Professor Donald A. Giannella has aptly articulated the value of adopting a broad, versus a case-by-case approach, to the question of whether a religious organization is religious. His objections to a case-by-case approach are applicable to this case. He describes the Supreme Court's approach toward *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), *Robinson* v. *DiCenso*, 403 U.S. 602 (1971), and *Tilton* v. *Richardson*, 403 U.S. 672 (1971):

> The Court elected to use a broad-brush technique in picturing the nature of church-related schools at both the lower and higher levels of education. In this way it could make judgments that would have a more or less conclusive effect with regard to institutions not before it . . .

> A broad approach . . . avoids burdensome and embarrassing problems for the judiciary. It eliminates the need of a case-by-case determination of which schools are too religious to receive aid without close supervision and which are not. Such a case-by-case approach would cause problems. First, the determination of different degrees of religiosity would involve the judiciary in just the kind of entanglement that the Court presumably was trying to avoid. Second, if a highly refined and particularistic test were adopted, some schools and religions would inevitably register plausible complaints of invidious discrimination or lack of equal treatment as the dividing line was etched out case-by-case. The *Horace Mann* decision provides an illustration of how a highly particularistic approach operates. In that case, the Maryland Court of Appeals struck down state grants to three church-related colleges but upheld one to a fourth institution on the ground that this school did not have a "fervent, intense, or passionate interest in religion." When judicial decisions turn on such "elusive" and "ephemeral" matters concerning religion, entanglement seems excessive and equal treatment of religions and schools is seriously endangered.

Giannella, *Lemon and Tilton: The Bitter and the Sweet of Church-State Entanglement*, 1971 Sup. Ct. Rev. 147, 181.

This Court has also recognized the First Amendment problems implicit in a case-by-case determination of an institution's religiosity. In assessing a statute which may have required "a detailed audit in the Court of Claims to establish whether or not the amounts claimed [by the nonpublic school] for mandated services constitute a furtherance of the religious purposes of the claimant," *New York* v. *Cathedral Academy*, 434 U.S. 125, 131-32, (1977) (citations omitted), the Supreme Court stated:

> But even if such an audit were contemplated, we agree with the appellant that this sort of detailed

> inquiry into the subtle implications of in-class examinations and other teaching activities would itself constitute a significant encroachment on the protections of the First and Fourteenth Amendments. In order to prove their claims for reimbursement, sectarian schools would be placed in the position of trying to disprove any religious content in various classroom materials. In order to fulfill its duty to resist any possibly unconstitutional payment, . . . the State as defendant would have to undertake a search for religious meaning in every classroom examination offered in support of a claim. And to decide the case, the Court of Claims would be cast in the role of arbiter of the essentially religious dispute.
>
> The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment, and it cannot be dismissed by saying it will happen only once . . .

Id. at 132-33.[1] *See also Aguilar* v. *Felton*, 473 U.S. 402, 413-14 (1985) (describing Establishment Clause problem of state agents making judgments concerning "matters that may be subtle and controversial, yet may be of deep religious significance to the controlling denominations" as both potentially politically divisive and "'rais[ing] more than an imagined specter of governmental secularization of a creed.'"). As the above demonstrates, adopting a *per se* rule that religious institutions are religious is consistent with the First Amendment's preference to avoid either requiring religious authorities to prove that their activities are religious or secular, or requiring secular authorities to resolve the same question.

[1] *Cf. Catholic Bishop of Chicago* v. *NLRB*, 559 F.2d 1112 (7th Cir. 1977), *aff'd.*, 440 U.S. 490 (1979) ("The determination that an institution is so completely a religious entity as to exclude any viable secular components obviously implicates very sensitive questions of faith and tradition. *See, e.g., Yoder, supra*, 406 U.S. 205, 92 S.Ct. 1526, 32 L. Ed.2d 15. At some point, factual inquiry by courts or agencies into such matters would almost necessarily raise First Amendment problems.").

This Court recognizes that categorizing certain schools as sectarian may not take into consideration the fact that "the degree of sectarianism differs from school to school," *Aguilar*, 473 U.S. at 412, n. 8, but believes that this "has little bearing on [the Court's] analysis . . .. [E]nforcement of the Establishment Clause does not rest on means or medians. If any significant number of the Title I schools create the risks described in *Meek*, *Meek* applies . . .'" *Id.* (quoting Judge Friendly's opinion in the court below, 739 F.2d at 70). *See also Public Funds for Public Schools* v. *Marburger*, 358 F.Supp. 29, 34 (D. N.J. 1973), *aff'd*, 417 U.S. 961 (1974)[2] (concluding, based on the Supreme Court's recognition that "'the *raison d'etre* of parochial schools is the propagation of religious faith,'" *Lemon*, 403 U.S. at 628 (Douglas, J., concurring), that nonpublic schools which have participated in program are, and will be, for the most part, church-related or religiously-affiliated educational institutions).

B. Programs Which Sponsor Activity Within Religious Organizations Are More Likely to Advance Religion.

An analysis of this statute's constitutionality must first recognize the Establishment Clause consequences of the fact that religious organizations are, by their very nature, formed to support religious ministry and "promot[e] the growth and efficiency" of the "church of which it forms a

[2] This Court's "affirmance of the result in *Marburger* was a decision on the merits, entitled to precedential weight." *Meek* v. *Pittenger*, 421 U.S. 349, 366 n.16 (1975).

coordinate part." 66 *American Jurisprudence* § 1 (2d Ed. 1973). Prior cases demonstrate that government sponsorship of programs within institutions of a religious nature can be itself determinative of an unconstitutional advancement of religion. *Compare Meek* v. *Pittenger*, 421 U.S. 349, 363 (1975) ("because of the predominantly religious character of the schools benefiting from the Act," "the direct loan of instructional material and equipment has the unconstitutional primary effect of advancing religion"); *and Hunt* v. *McNair*, 413 U.S. 734, 743 (1973) (when aid earmarked for secular purposes flows to institutions where a "substantial portion of its functions are subsumed in the religious mission," state aid has the impermissible effect of advancing religion) *with Wolman* v. *Walter*, 433 U.S. 229, 247-49, (1977) (offering therapeutic and remedial services by public employees "under circumstances that reflect their religious neutrality," will not have the impermissible effect of advancing religion). *See also Aguilar* v. *Felton*, 473 U.S. 402, 412 (1985) (program combining aid to pervasively sectarian institutions with aid in the form of teachers, violates the Establishment Clause).

II. NOTHING IN THE STATUTE INSURES A RELIGIOUS ORGANIZATION WILL NOT USE TAX FUNDS TO INCULCATE RELIGION.

When the state subsidizes an activity, such as counseling, it "must be certain, given the Religion Clauses, that subsidized [counselors] do not inculcate religion." *Meek*, 421 U.S. 371 (recognizing that "a state-subsidized guidance counselor is surely as likely as a state-subsidized chemistry teacher to fail on occasion to separate religious instruction and the advancement of religious beliefs from his secular education responsibilities."). There is nothing, however, in the statute to insure that the religious organization/grantee will not use the aid to inculcate religion.

There is no requirement that services be provided on religiously neutral territory. *Cf. Meek*, 421 U.S. at 371. *See also Wolman*, 433 U.S. at 247. Nor is there a requirement that the grantees use materials prepared by secular authorities. *Levitt* v. *Committee for Public Education*, 413 U.S. 472 (1973). Nor is there any requirement that the counselors be religiously neutral in their approach or not be under the control of religious authorities. *Id.* at 480.[3]

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[3] Religious organizations, because of the Religion Clauses of the First Amendment, are afforded special protection. *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696 (1976); *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94 (1952). This includes protection against the government interfering with the selection of employees that are involved in transmitting the organization's teachings and beliefs. *Rayburn* v. *General Conference of Seventh-day Adventists*, 772 F.2d 1164 (4th Cir. 1985).

In addition, in recognition of free exercise concerns, the Congress has exempted religious organizations from Title VII's prohibition against discrimination in employment because of religion. 42 U.S.C. § 2000e-1. *See also Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints* v. *Amos*, 107 S.Ct. 2862 (1987).

AFLA, however, provides for the payment of funds to these same religious organizations which have a constitutional and statutory right to discriminate on the basis of religion in employment matters. There is no waiver of these constitutional or statutory protections under AFLA. Justice White has noted that legislation providing assistance to sectarian schools, which restricts entry on religious grounds, would, to that extent, be unconstitutional. *Lemon* v. *Kurtzman*, 403 U.S. 602, 671, n. 2 (1971) (White, J., dissenting). This same reasoning should apply to religious organizations that hire counselors and pay them with tax-derived funds and at the same time enjoy the right to discriminate on the basis of religion as to hiring and other employment-related actions.

III. ONCE A STATUTE REQUIRES INVOLVEMENT OF RELIGIOUS ORGANIZATIONS, ITS CONSTITUTIONALITY DEPENDS ONLY ON WHETHER THE ACTIVITY IS OF A TYPE THAT ENTAILS RISK OF INCULCATING RELIGION.

The constitutionality of a statute, that on its face allows for the involvement of a religious organization in a governmental program, depends upon the type of government sponsored activity which the statute contemplates. If the statute contemplates sponsoring an activity in which there is a significant risk of governmental aid being used to inculcate religion, then such a statute offends the Establishment Clause. *Lemon*, 403 U.S. at 619-20 (presence of "potential for impermissible fostering of religion," which can be eliminated only by comprehensive, discriminating, and continuing state surveillance conflicts with the Religion Clauses.). Only when there is no such risk, as when the state provides services to religious institutions, "in common to all citizens [that] are so separate and so indisputably marked off from the religious function,' . . . that they may fairly be viewed as reflections of a neutral posture toward religious institutions," *Wolman*, 433 U.S. at 251 n. 18 (citations omitted), is such aid permissible. The program in this case, however, does not conform to such a constitutionally permissible characterization. It conforms, rather, to characterizations of constitutionally impermissible programs.

A. Factors that Create Constitutionally Impermissible Risk of Inculcating Religion

This Court considers a number of factors in determining whether a sponsored activity is the type that creates this impermissible risk of inculcating religion. The first concerns whether the state has involved religious organizations in ideological activities that are related to the

religion-oriented function of the organization. *Meek*, 421 U.S. at 364 (teaching involves religious values and beliefs). This, the state is not permitted to do, because involving ideological material in an activity creates an opportunity for the actor to transmit ideological views. *Levitt* v. *Committee for Public Education*, 413 U.S. 472, 480 (1973) ("substantial risk that these examinations, prepared by teachers, under the authority of religious institutions, will be drafted with an eye, unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church."); *Meek*, 421 U.S. at 366 ("the teaching process, to a large extent, is devoted to the inculcation of religious values and beliefs"), *Wolman*, 433 U.S. at 247 (therapist's relationship with pupil provides "opportunities to transmit ideological views" which creates danger of advancing religion, when therapy is conducted in non-neutral environment); *Id.* at 244 (distinguishing diagnostic services from counseling and teaching on the basis that the former "have little or no educational content and are not closely associated with the educational mission of the nonpublic school").

This Court also considers whether religious or secular authorities control those involved in the sponsored activity. *Compare Wolman*, 433 U.S. at 240, ("The nonpublic school does not control the content of the test or its result. This serves to prevent the use of the test as a part of religious teaching, and thus avoids that kind of direct aid to religion found present in *Levitt*. Similarly, the inability of the school to control the test eliminates the need for supervision that gives rise to excessive entanglement."); *and Meek*, 421 U.S. at 371 (recognizing that in this case, "auxiliary-services personnel, because not employed by the nonpublic schools, are not directly subject to the discipline of a religious authority.") *with Levitt*,

413 U.S. at 480, (recognizing that teachers who prepare tests under authority of religious institutions are more likely to inculcate religion); *and Lemon*, 403 U.S. at 617 ("We cannot ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of precollege education.").

Likewise relevant to this Court's determination of the risk of the government sponsored activity inculcating religion is the relationship between those carrying out the program and the recipients of the program. This Court has noted that the relationship between counselor and student provides an opportunity for the transmission of sectarian views, beyond that provided in the constitutionally permissible relationship between diagnostician and the pupil. *Wolman*, 433 U.S. at 244. *See also Wamble* v. *Bell*, 598 F.Supp. 1356, 1371 (W.D. Mo. 1984) ("teachers are afforded a unique opportunity to form substantial and enduring relationships with students and to transmit ideological views.").

Based upon the above-described factors, it is clear that the AFLA program involves a significant risk that government funds—taxpayers' dollars—will be used to inculcate religion. The statute permits religious organizations to be grantees and envisions a direct role for those organizations in the education and counseling components of AFLA grants. *See* 42 U.S.C. § 300z-5(a)(21)(B); *id.* at §§ 300z-1(a)(4)(A), (B), (D), (H), (L), and (M) (seven of seventeen listed services explicitly involve "education" or "counseling."). As the district court found, the grantee's functions

> . . . amount to *teaching* by . . . religious organizations, about the harm of premarital sexual relations and the factors supporting a choice of adoption rather than abortion, and these matters are fundamental elements of religious doctrine. Moreover, the AFLA contains no restriction whatsoever against the teaching of religion *qua* religion or any attempt to use the education and counseling process to "intentionally or inadvertently" inculcate religious belief.

Kendrick v. *Bowen*, 657 F.Supp. 1547, 1562-63 (D. D.C. 1987) (emphasis in original).

Thus, the AFLA offends all of the factors discussed above: The activity involves teaching and counseling, which provides the opportunity to transmit sectarian views; the material involves fundamental elements of religious doctrine; and the religious institutions can control the program. The district court recognized: "[B]y contemplating the provision of aid for the purpose of encouraging abstinence and adoption to organizations affiliated with these religions [which hold as a fundamental tenet that premarital sex and abortion are wrong, even sinful], the AFLA contemplates subsidizing a fundamental religious mission of those organizations." *Id.* at 1563. A program of this nature inherently has a great potential for the diversion of secular funds to the inculcation of religious values and beliefs. *Amicus* submits that this program can be accurately characterized, as the court characterized the *Levitt* case, where "there was an impermissible risk of religious indoctrination inherent in some of the required services themselves," which rendered the program constitutionally invalid. *Cathedral Academy*, 434 U.S. at 131.

B. The Evidence Demonstrates AFLA Grantees Have Inculcated Religion as Part of Their Programs.

The materials produced by AFLA grantees evidence the reality of the risk that grantees will use the government sponsored program to inculcate their religious

beliefs. The material from one grantee, the Pregnancy Distress Center (PDC), demonstrates how this grantee is advancing religion in its AFLA program. The PDC material for counselor training instructs trainees when counseling a client who has had a negative pregnancy test, "If appropriate, [to] share God's plan for sex in marriage . . .. Help *create* a dream for the client if there is not one there to re-awaken." (L.D. 57)[4] The counselor is also to address "'deeper problem solving,'" which is to include: "How could [the client] deepen relationships with others and with God?" *Id.*

The material the PDC provides to pregnant teenagers includes abundant references to religion and encouragement on the basis of "God's plan" for the teenager not to terminate the pregnancy:

> Your choice to give another human being a chance at life is in keeping with God's plan. You might believe your pregnancy is a stumbling block. But God desires to turn your experience into a stepping stone toward Him.
>
> Did you know that Psalm 139 applies to *both* you and your baby?
>
> > You made all the delicate, inner parts of my body and knit them together in my mother's womb. Thank You for making me so wonderfully complex! It is amazing to think about. Your workmanship is marvelous—and how well I know it . . .. You saw me before I was born and scheduled each day of my life before I began to breathe. Every day was recorded in Your Book! (Psalm 139:13-16)

[4] "L.D. #" refers here, and in the upcoming paragraphs, to the page number of the "Lodged Documents" submitted to this Court by the National Organization of Women, Legal Defense and Education Fund, in connection with their *amicus* brief in this case.

> Did you discover the significant words? *He saw us before we were even born!* Mindboggling, isn't it? God is keenly aware of our situation. He isn't just standing around watching it happen!
>
> . . . [God] promises He will be right in the cyclone with us. "I am with you *always*, even to the end of the world." (Matthew 28:26) From the moment you chose to carry your baby full-term God chose to bless you because of your refusal to tamper with someone else's life.

(L.D. 41-42) (emphasis in original).

This material also includes "an example of the kind of prayer you might pray if you want to accept Jesus Christ as your Lord and Savior."

> Lord, I bring you my sinful nature as you've revealed it to me. I know I don't have anything valuable to offer except myself and my love. I can't earn your forgiveness, but you've offered it as a free gift from your Son, Jesus Christ. I accept your control of my life, and intend to serve you, obey you and follow you from this moment forward. You have my past, my present, my future, my family, my child, my money and my time. Nothing will I withhold. Thank you for loving me and forgiving me and making me your own. Amen.

(L.D. 42).

The material from the Pregnancy Problem Center, another grantee, seeks "volunteers, prayers, and financial help," urging that "The child of the silent scream [referring to title of an anti-abortion movie] is your brother in Christ. His mother is your sister. Their cries go out to you." (L.D. 65) The group, the material advertises, is "seeking 7 people to pray each day for one hour for our work . . .. Prayers could be done in church, at home, or within a prayer group." *Id.* This grantee likewise includes

in its material a "Prayer at an Abortion Chamber," which includes the following language:

> Father I come to this place as to a new Calvary. I wish to stand here with Mary and those others who stood by the Cross of Jesus the day he sacrificed Himself for us sinners.
>
> I firmly believe the sorrowful scene before my eyes is nothing less than a reenactment of Jesus' suffering and death, already anticipated in the massacre of the Innocents of Bethlehem and repeated in the slaughter of these least brethren of His, the tiny children brought here for killing.
>
> O Father, I realize I cannot stop the killing of most of these children, any more than Mary could have the slaying of her Child that day. I unite my heart to hers in faith and grieving love and humbly adore your divine purpose in allowing such bloodshed. I offer you the blood of Jesus and, mingled with it, the blood of these little ones, the abortionists, and our whole society. Please remember Jesus' own prayer from the Cross with its echo in Mary's heart: "Father, forgive them for they know not what they do."

(L.D. 66)

The Christian Family Care Agency also involves religion in its advertisements for its services: "Through our adoption services, healthy Christian families are carefully screened . . .." These materials include numerous quotes from the *Bible* which are used to support the agency's actions. For example, the above advertisement for adoption services is followed by "The Christian who is pure and without fault from God the Father's point of view is the one who takes care of orphans . . .. James 1:27." (L.D. 8)

The above material substantiates *amicus*' argument that the risk that grantees will use government funds to

support their religious positions is inherent in the AFLA. It is clear from these quotes that these religious institutions/grantees have done precisely this.

IV. REVENTING THE RISK THAT TAX SUPPORTED ACTIVITY WILL BE USED TO INCULCATE RELIGION WOULD CONSTITUTE ENTANGLEMENT BETWEEN CHURCH AND STATE.

When the potential for impermissible fostering of religion is present, "[t]he State must be certain, given the Religion Clause, that subsidized [counselors] do not foster religion." *Earley* v. *DiCenso*, 403 U.S. at 618-19. However, in the context of the state-subsidized teaching and counseling by religious organizations,

> A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that . . . the First Amendment . . . is . . . respected. Unlike a book, [however] a [counselor] cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the implications imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church.

Lemon, 403 U.S. at 619. *See also Aguilar*, 473 U.S. at 410; *Meek*, 421 U.S. at 352-53; *Marburger*, 358 F.Supp. at 36-37, *aff'd*, 417 U.S. 961 (excessive entanglement would result from attempt to police use of material and equipment that were readily divertible to religious uses).

Thus, the excessive entanglement between government and religion that would be fostered by an attempt to monitor the program demonstrates the statute's unconstitutionality under the Establishment Clause.

V. THE STATUTE'S ENDORSEMENT OF RELIGION OFFENDS THE ESTABLISHMENT CLAUSE.

Government legislation that "endors[es] a particular religious belief or practice that all citizens do not share," offends the Establishment Clause. *Wallace* v. *Jaffree*, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring). The religious belief that abortion and premarital sex are wrong is not a belief shared by all citizens. If an "objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement" of a particular religious belief or practice, then that statute cannot pass Establishment Clause scrutiny. *Id.*

The AFLA clearly sends a message of endorsement relative to those religious organizations that embrace religious tenets that premarital sex and abortion are wrong or sinful. Such a statute offends the Establishment Clause because it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch* v. *Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). As Justice O'Connor explains: A state endorsement of a particular religious belief or practice "infringes the religious liberty of the nonadherent, for '[w]hen the power, prestige, and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.'" *Wallace*, 472 U.S. at 70, *quoting Engel* v. *Vitale*, 370 U.S. 421, 431 (1962).

When an adolescent is counseled by an AFLA counselor, on the premises of a religious organization, about a matter which she knows to be a fundamental tenet of the

same religious organization, she would likely perceive that the state was endorsing a particular religious belief and practice. The adolescent who supports these beliefs would feel herself to be an insider, a favored member of the political community. The adolescent who opposes the beliefs would sense herself to be an outsider, only a partial member of the political community. The individual being counseled would likewise closely identify the government's power with the particular religious institution where the counseling occurs, and with the particular doctrine advocated. Such an appearance constitutes government promotion of religion. *Grand Rapids School District* v. *Ball*, 473 U.S. 373, 389 (1985). Children in their formative years are particularly vulnerable to perceiving such a symbolic union between church and state. *Id.* at 390.

VI. APPELLEES HAVE FEDERAL TAXPAYER STANDING TO CHALLENGE THE APPLICATION OF AFLA.

In this case the defendant and defendant-intervenors did not contest plaintiffs' standing to challenge the constitutionality of the AFLA on its face but contended that plaintiffs did not have taxpayer standing to challenge the Act as applied. *Kendrick* v. *Bowen*, 657 F.Supp. 1547, 1554 (D. D.C. 1987).

The Secretary, in his brief before this Court again raised the standing issue stating that "the district court erred when it held . . . that appellees have standing as federal taxpayers to challenge the statute as applied." Brief for Secretary Appellant at 31 n. 24. The Secretary makes this claim on its distorted reading of *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U.S. 464 (1982). The Secretary

argues that "[j]ust as the plaintiffs in *Valley Forge* lacked standing to challenge 'a decision by HEW to transfer a parcel of federal property' . . . so, too, do appellees lack standing to challenge the individual spending decisions made by the Secretary in implementing the AFLA." Brief for Secretary Appellant at 31 n. 24.

This Court ruled in *Flast* v. *Cohen*, 392 U.S. 83 (1968), that federal taxpayers have standing based on their status as such to challenge legislation when they meet the following two-part test:

> First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked . . .. Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement,. the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8.

Id. at 102-103.

Applying this test, the Court in *Flast* specifically held that federal taxpayers have standing to challenge the constitutionality of programs enacted pursuant to congressional power under the Taxing and Spending Clause of art. I, § 8 of the Constitution. The plaintiffs in *Flast* challenged expenditures by the Secretary of Health, Education and Welfare under Titles I and II of the Elementary and Secondary Education Act of 1965. That Act was an exercise by Congress of its power to spend for the general welfare under art. I. *Id.* at 103. It was alleged that certain expenditures under the Act were in violation of the Establishment Clause. The Court ruled that the

Establishment Clause acted as a constitutional limitation on the taxing and spending power of Congress under art. I. *Id.* at 104. Appellees in this case meet the requirements of taxpayer standing enunciated in *Flast*. The AFLA was also enacted pursuant to the Taxing and Spending Clause.

As the district court stated, the plaintiffs in *Valley Forge* were not challenging any expenditure whatsoever, they were challenging the disposal of surplus federal property, *Kendrick* v. *Bowen*, 657 F.Supp. at 1555. This Court in *Valley Forge* noted that the legislation authorizing the challenged action was passed pursuant to the Property Clause, art. IV, , cl. 2 and held that this fact was "decisive of any claim of taxpayer standing under the *Flast* precedent." 454 U.S. at 480 (footnote omitted). The challenge by appellees here is not at all similar to that in *Valley Forge*.

The Secretary interprets *Valley Forge* to hold that only facial challenges to congressional enactments can be brought under federal taxpayer standing. The Secretary's argument must fail for two reasons. First, the Secretary's interpretation reads too much into the Court's ruling in *Valley Forge* and ignores the facts in *Flast*. The fallacy of this interpretation can be seen by an examination of *Flast* and other cases upholding taxpayer standing and by an analysis of the reasoning in those cases where taxpayer standing has been denied. Secondly, the Secretary distorts the nature of the appellee's claim and strains to equate it with the claim in *Valley Forge*.

A. *Flast* and the Extent of Taxpayer Standing

In *Flast* the defendants were the federal officials in the Executive Department entrusted by Congress with the duty to administer the challenged Act. This Court summarized the complaint in *Flast* as follows:

> While disclaiming any intent to challenge as unconstitutional all programs under Title I of the Act, the complaint alleges that federal funds have been disbursed under the Act, "with the consent and approval of the [appellees]," and that such funds have been used and will continue to be used to finance "instruction in reading, arithmetic, and other subjects and for guidance in religious and sectarian schools" and "the purchase of textbooks and instructional and library materials for use in religious and sectarian schools." . . . The complaint asked for a declaration that appellees' actions in approving the expenditure of federal funds for the alleged purposes were not authorized by the Act or, in the alternative, that if appellees' actions were deemed within the authority and intent of the Act, "the Act is to that extent unconstitutional and void."

392 U.S. at 87.

This language makes it clear that the Court did not intend to prohibit challenges to the actions of executive officers in implementing congressional spending schemes such as that presented here. In *Wheeler* v. *Barrera*, 417 U.S. 402 (1974), this Court declined to rule on the issue of whether delivery of Title I services to parochial school students on the premises of parochial schools would violate the Establishment Clause. The Court noted that Title I did not require on-premises parochial school instruction and that "the First Amendment implications may vary according to the precise contours of the plan that is formulated." *Id.* at 426. This Court said:

> The task of deciding when the Establishment Clause is implicated in the context of parochial school aid has proved to be a delicate one for the Court. Usually it requires a careful evaluation of the facts of the particular case. It would be wholly inappropriate for us to attempt to render an opinion on the First Amendment issue when no specific plan is before us. A federal court does not sit to render a decision on hypothetical facts . . ..

Id. at 426-427 (citations omitted).

In *Aguilar* v. *Felton*, 473 U.S. 402 (1985), this Court ruled on the merits of a taxpayer challenge to New York City's plan for implementing Title I. This Court specifically stated that the case was a taxpayer suit. *Id.* at 407. The defendants were the Secretary of the United States Department of Education and the Chancellor of the New York City Board of Education. In holding that jurisdiction by appeal under 28 U.S.C. § 1252 did not lie, the Court noted that the decision appealed was not one in which the court of appeals had "held an Act of Congress unconstitutional as applied (i.e. that the section, by its own terms, infringed constitutional freedoms in the circumstances of that particular case) or as a whole." *Id.* at 408, n. 7. This holding that the Court's jurisdiction was properly by way of petition for certiorari and not by appeal is significant. It was based upon the interpretation of 28 U.S.C. § 1252 in *United States* v. *Christian Echoes National Ministry*, 404 U.S. 561 (1972).

In that case, the Court made a distinction between a holding that an act is unconstitutional as applied and a holding that a result obtained by the use of the statute is unconstitutional. *Id.* at 565. The latter type of holding is not appealable under § 1252, and it was this type of holding that the Court held it was reviewing in *Aguilar*. The significance of this is that the Court was acknowledging that the taxpayer challenge in *Aguilar* was limited to the manner in which the Department of Education was administering Title I in New York City and was not a challenge to Title I itself.

This directly corresponds with the Second Circuit's characterization of that case. *Felton* v. *Secretary, U.S.*

Department of Education, 739 F.2d 48 (2d Cir. 1984), *aff'd sub nom. Aguilar* v. *Felton*, 473 U.S. 402 (1985). The Second Circuit also acknowledged that the case was brought by taxpayers whose standing was based on the Court's holding in *Flast*. *Id.* at 52. The Second Circuit characterized the complaint as challenging the delivery of services on the premises of parochial schools and said further that the program of on-premises delivery was based on regulations issued by the Secretary "[g]oing somewhat beyond the statute." *Id.* at 50.

B. *Valley Forge* and the Limits of Taxpayer Standing

The Secretary's interpretation of *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U.S. 464 (1982), barring the claims here because they challenge executive action and not congressional action, misreads *Valley Forge* and would make a nullity of *Flast*.

The plaintiffs in *Valley Forge* challenged the transfer of surplus federal property by the Secretary of Health, Education and Welfare to a sectarian institution. The transfer was an isolated action taken pursuant to the Federal Property and Administrative Services Act of 1949, 40 U.S.C. §471 *et seq*. This Act was passed under the authority of the Property Clause of the Constitution, art. IV, §3, cl. 2. Not only was this not a congressional spending program, the transfer did not involve the expenditure of any funds. The Court in *Flast* specifically limited taxpayer standing to suits involving congressional acts passed pursuant to the Taxing and Spending Clause, art. I, §8. 392 U.S. at 102. In *Valley Forge* the Court declined to expand taxpayer standing to suits involving congressional acts passed pursuant to other clauses.

Besides citing *Flast*, the *Valley Forge* Court discussed only two other cases in illustrating the limits of taxpayer standing: *Schlesinger* v. *Reservist Committee to Stop the War*, 418 U.S. 208 (1974), and *United States* v. *Richardson*, 418 U.S. 166 (1974). *Schlesinger* involved a claim that the holding of a commission in the armed forces reserve by members of Congress was a violation of the Incompatibility Clause, art. I, §6, cl. 2., which states, "No person holding any Office under the United States, shall be a member of either House during his Continuance in Office." *Richardson* involved a claim that legislation allowing the CIA to withhold from the public detailed information about its expenditures violated the Accounts Clause, art. I, §9, cl. 7, which states, "And a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."

A reading of both of these cases, as well as the summary of their holdings contained in the *Valley Forge* opinion, reveals that taxpayer standing was denied because neither case involved a challenge to an enactment under the Taxing and Spending Clause of art. I, §8, the same factor that was fatal to the standing claim in *Valley Forge*. The only reference with respect to Executive Branch action and taxpayer status is the following statement in *Schlesinger:*

> We agree with that conclusion [of district court denying taxpayer standing] since respondents did not challenge an enactment under Article I, section 8, but rather the action of the Executive Branch in permitting Members of Congress to maintain their Reserve status.

418 U.S. at 228 (footnote omitted). This statement cannot be reasonably interpreted to bar taxpayer challenges to the manner in which an Executive Branch agency imple-

ments a spending program enacted pursuant to Congress' power to spend for the general welfare under art. I, § 8.

A proper understanding of the limitation of taxpayer standing to executive action is gained by a re-reading of the *Flast* decision, as the Court did in *Valley Forge* and the district court did in this case. In *Flast*, the Court, after limiting taxpayer cases to those challenging exercises of power under art. I, § 8 said, "It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute." 392 U.S. at 102.

C. The Secretary Ignores Settled Law and Attempts to Gut this Court's Decision in *Flast*.

A review of the jurisdictional statement and the various briefs of the parties filed in *Flast* v. *Cohen* is instructive and clearly demonstrates that the Secretary is attempting to now persuade this Court with the same arguments which the government made to this Court 20 years ago in *Flast*.

In the jurisdictional statement filed in *Flast*, the question presented was as follows:

> The appeal presents a single question: Do citizens and taxpayers of the United States have standing to challenge in the federal courts an expenditure of Federal funds on the ground that it is in violation of the establishment and free exercise provisions of the First Amendment to the United States Constitution?

The government, in its brief in *Flast*, well understood the nature of the question presented to the Court in that case, stating it in language similar to that stated by the taxpayers as follows:

> Whether appellants, as citizen-taxpayers, have standing, solely by virtue of that status, to enjoin federal officers from approving federal grants to State agencies which allegedly use the funds in violation of the First Amendment?

(*Flast* Brief for Appellees at 2).

The government, in its argument in *Flast*, stated:

> That it is the specifics of administration that they assail rather than the constitutionality of the Act—a distinction which, as discussed below, is decisive on the three-judge court question—becomes even more clear when other statements in their brief are examined in light of the structure of the Act. . .

(*Flast* Brief for Appellees) at 13-14).

This case cannot be said to be less of an attack on a federal taxing and spending enactment than *Flast*. It is apparent that even after 20 years the government is still making the same argument long ago rejected by this Court in *Flast*.

CONCLUSION

For all of the foregoing reasons, the judgment of the District Court for the District of Columbia should be affirmed.

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Respectfully submitted,

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